



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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OFFICE OF GENERAL COUNSEL

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September 24, 1981

Mr. Fred H. Dietrich
Associate Administrator
Office of Federal Procurement Policy
726 Jackson Place, N.W.
Washington, D.C. 20503

Dear Mr. Dietrich:

This will confirm informal discussions between Mr. Norm Latker, of your agency, and Mr. John McGrail, of my staff, concerning a potential problem in the interim version of OMB Bulletin 81-22. The Bulletin implements sections 202 through 204 of Public Law No. 96-517, 94 Stat. 3015, December 12, 1980. Those sections give non-profit organizations and small businesses a first right of refusal to title in inventions made by them in performance of Government grants, contracts, or cooperative agreements; (referred to collectively as funding agreements) subject to some limited exceptions. This right extends to small businesses and non-profit organizations which are subcontractors under funding agreements generally. However, the Bulletin may be read as denying this right to non-profit organizations and small businesses whose subcontract is with a prime contractor which is not a small business or non-profit organization.)

The "Clause for Funding Agreements (Small Business Firms and Non-Profit Organizations)," which is generally required by section 5(c) of the Bulletin to be in all funding agreements with small business firms and non-profit organizations, states in part:

"(g)(1) The contractor will include this clause, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental or research work to be performed in the United States by a small business firm or a non-profit organization. The subcontractor will retain all rights provided for the contractor in this clause, and the contractor will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions." (Emphasis in original.)

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The term "contractor" is defined in the Bulletin as--

"* * * any small business firm or non-profit organization that is a party to a funding agreement." Section 5a(2).

It could be argued that only those small businesses or non-profit organizations which are subcontractors to "contractors," as defined in the Bulletin--that is, to small businesses or non-profit organizations--are covered by the Bulletin and therefore have right of first refusal. In contrast, those small businesses or non-profit organizations which are subcontractors to organizations other than "contractors"--to profit-making corporations, for example--would not be covered by the Bulletin.

The Bulletin's definition differs from, and is more restrictive than, that found in 35 U.S.C. §201(c) as amended by Public Law No. 96-517, 94 Stat. 3019, which defines "contractor" to mean--

"* * * any person, small business firm, or nonprofit organization that is a party to a funding agreement."

Thus, by including "person" within its definition of contractor, the statute assures coverage of small business and non-profit organization subcontractors under contracts with profit-making firms.

We understand that it was not the intent of the Bulletin to divide small business and non-profit organization subcontractors into the two categories discussed above--that is, those which are subcontractors to "contractors" as that term is defined under the Bulletin and those which are subcontractors to organizations other than "contractors." Nevertheless, we recommend that the final version of the Bulletin be clarified to avoid such an interpretation. This could be accomplished by including the term "person" in the Bulletin's definition of "contractor."

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel